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No. 84-276

In The

Supreme Court of the United States

October Term, 1984

TEXAS FARM BUREAU,

Petitioner,

vs.

UNITED STATES OF AMERICA

On Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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With the Court's indulgence, Petitioner Texas Farm Bureau ("TFB") would ask leave to respond briefly to three points raised in the United States' Memorandum in Opposition ("Mem. Opp.").

1. The Standard of Review in the Decision Below

The Memorandum for the U. S. misinterprets somewhat the nature of appellate scrutiny applied by the Court of Appeals in determining this cause. By stating (Mem. Opp.5) that

> . . . the district court plainly erred in denying the government's motion for a directed verdict and in submitting the question of the character of the advances to the jury, since reasonable men could not possibly conclude that the advances created bona fide indebtedness. The court of appeals thus correctly reversed the district court and directed that judgment be entered for the United States[,]

the government unmistakably implies that the District Court's judgment on the verdict was reviewed and reversed under the deferential, "reasonable men" standard generally accorded fact-findings by the rule of *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969), analogous to Fed.R.Civ.Pro. 52(a)'s "clearly erroneous" review. This simply was not the case. As both opinions by the Court of Appeals make amply clear (*e.g.*, Pet. App. A-10 and esp. A-22), the Fifth Circuit panel analyzed the ultimate issue — loan vs. contribution to capital — as one of law and subjected the District Court's decision to a plenary review, the sort reserved for constitutional questions and statutory construction. Rid of the verdict through this means, the court below, as its "evaluation" (Pet. App. A-10) of debt-equity factors, simply engaged in *de novo* fact-finding in favor of the Internal Revenue Service.

TFB vehemently contends before the Justices today that such a process was error. Its position remains that debt-equity presents an ultimately factual issue, that the District Court's judgment should have received *Boeing v.*

Shipman review, and that under such review, that judgment would and should be upheld.

2. The "Happily Coexisting Heterogeneity of Verbal Attitudes"

In perhaps the sublimest example of semantic overvoltage since Gen. Haig's retirement from public office, the IRS describes the massive and well-documented split (*see* Mem. Opp. 6 and notes) in the Circuit Courts concerning debt-equity analysis as a

> heterogeneity of verbal attitudes — which have [sic] coexisted quite happily for 25 years . . . a matter of little more than philosophical interest [Mem. Opp. 7].

Such a position on the part of the IRS is hardly surprising in view of their outstanding contribution to this "happy heterogeneity." As the Sixth Circuit noted in *Ragland v. Comm'r.*, 435 F.2d 118, 119 (1970):

> [i]n *Berthold*,[1] *Foresun*[2] and other cases where the clearly erroneous standard favored the collection of the tax by the Government, the Commissioner argued that the determination involved an issue of fact requiring application of the clearly erroneous standard.
>
> In the present case, where the decision of the Tax Court is adverse to the Government, we are invited (as we were in *Austin Village*[3]) to hold that the conclusions of the finder of facts are erroneous as a matter of law.
>
> The Commissioner should not "blow hot or cold, depending on which standard of review would require payment of the tax" (concurring opinion of Judge Edwards in *Austin Village, Inc. v. United*

[1] *Berthold v. Comm'r.*, 404 F.2d 119 (6th Cir. 1968).
[2] *Foresun, Inc. v. Comm'r.*, 348 F.2d 1006 (6th Cir. 1965).
[3] *Austin Village, Inc. v. United States*, 432 F.2d 741 (6th Cir. 1970).

> States, supra). It seems that if the Commissioner now is convinced that the findings at the trial tribunal in this type of case should be reviewed as a matter of law, the logical step is to seek reversal of *Duberstein*[4], which this Court has no power to do. We decline to reverse the decisions of this Court following *Duberstein*.

Moreover, TFB would respectfully submit that an improperly reversed judgment in a sum over $95,000 is a matter of considerably more than mere "philosophical interest" to its membership, and that perhaps it is entitled to a trifle less patronizing a response than heretofore has been lavished upon it. Incorporating the principles of *Duberstein*, the Sixth Circuit's (and others, Mem. Opp. 6) approach to the debt-equity problem is the better view and provides the best conceptual framework for adjudicating this continually-recurring question throughout the country. Given the applicability of *Duberstein* to areas as factually distant as employment discrimination, see *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982), to ignore its relevance to debt-equity questions under the Tax Code is an inconsistency bordering on the inane. *Duberstein*'s principles likewise mandate a granting of the petition and reversal.

3. A Different Result: *Byerlite Corp. v. Williams*, 286 F.2d 285 (6th Cir. 1960)

As its parting shot in footnote 12 (Mem. Opp. 8), the IRS states:

> Petitioner can point to no court of appeals decision even suggesting that another circuit would have reached a different result on the facts here . . .

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[4] *Comm'r. v. Duberstein*, 363 U.S. 278 (1960), any mention of which is notably absent from the Memorandum in Opposition.

The Texas Farm Bureau would respectfully draw the Court's attention to the case of *Byerlite Corp. v. Williams*, cited above, decided by the Sixth Circuit in favor of the taxpayer some six months after *Duberstein*. Like the case at bar (but unlike the vast majority of debt-equity cases) *Byerlite* involved two closely-related corporate affiliates, one (*Byerlite*) of which advanced considerable sums to the other (Export) for operating expenses, machinery and facilities and ultimately claimed a bad debt deduction for a portion of the advances when the subsidiary affiliate ceased to function effectively. *Byerlite*, 286 F.2d 286-290. In *reversing* a decision for the IRS under the clearly erroneous standard, the Court pointed to the books of the corporations:

> On the books of Byerlite, the advances to Export were carried as accounts receivable; on Export's books, as accounts payable. *This is the nomenclature of debt.* [*Byerlite*, 290, emphasis added].

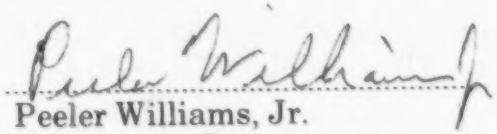
Throughout the course of litigation in the case presently at bar, it has never been disputed that all advances by TFB to its affiliate were carried in precisely the same fashion on each company's books.[5] In view of this, the Farm Bureau finds the government's and the Court of Appeals' references to "non-evidenced indebtedness" (Mem. Opp.2, Pet. App. A-5), difficult to fathom.

TFB respectfully argues that in this disregard of undisputed material facts, as well as in the other mat-

[5] Stipulation mm, Plaintiff's Exhibit 34 and Defendant's Exhibit HH, Stipulated Facts, reads as follows: "The accounting records of Texas Farm Bureau and TAMDA carried the amounts advanced by Texas Farm Bureau to or for TAMDA as accounts receivable and accounts payable, respectively."

ters heretofore argued, the court below committed reversible error necessitating a grant of certiorari and judgment for Petitioner.

Respectfully submitted,



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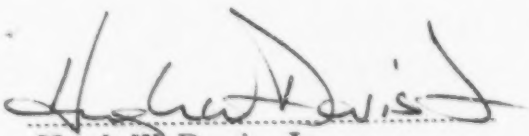

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CERTIFICATE OF SERVICE

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Honorable Rex E. Lee
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Washington, D.C. 20530

and depositing the above with the United States Postal Service on this the 11th day of December, 1984.

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